NO. 89-213

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v

INOCENCIO MUNIZ,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

I. ARE RESPONDENT'S STATEMENTS, INCIDENT TO BOOKING AND FIELD SOBRIETY TESTING, TESTIMONIAL NOT DEMONSTRATIVE, PREVENTING THEIR ADMISSION AT TRIAL WHEN *MIRANDA* WARNINGS WERE NOT GIVEN?

II. DO THE INSTRUCTIONS, CLARIFICATIONS AND BACKGROUND QUESTIONS POSED TO RESPONDENT DURING FIELD SOBRIETY TESTING AND BOOKING CONSTITUTE INTERROGATION WITHIN THE PURVIEW OF THE *MIRANDA* DOCTRINE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES CONT'D

TABLE OF AUTHORITIES CONT'D

TABLE OF AUTHORITIES CONT'D

STATEMENT OF THE CASE

Respondent accepts the facts as stated by Petitioners except as modified, explained or supplemented. The evidence at trial included the following.

In the early morning hours of November 30, 1986, Officer David Spotts of the Upper Allen Township Police Department observed a vehicle parked on the berm of U.S. Route 15 with its engine running and emergency flashers activated. The driver was Inocencio Muniz. (J.A. 12-13).

The officer detected a strong odor of alcohol emanating from Muniz's breath. He also observed that Muniz's eyes were bloodshot, and he noted poor coordination. Officer Spotts then directed Muniz to remain along the roadside until he was in a condition to operate his vehicle safely. (J.A. 13-14).

As Officer Spotts was returning to his car, Muniz's vehicle pulled back onto the highway. The patrolman pursued and pulled Muniz over. (J.A. 14-15). The officer

then requested Muniz's license and registration cards. Muniz fumbled through his wallet, dropping several cards, and eventually provided his Social Security card and U.S. Department of Agriculture farm labor card. After a second request, Muniz produced the proper identification. (J.A. 16-18).

Officer Spotts then asked Muniz to perform several field sobriety tests: the horizontal gaze nystagmus test, the "walk and turn" test, and finally, the "one leg stand" test. Muniz failed each of these tests, according to Officer Spotts. During these tests, Muniz admitted he had been drinking, that he was drunk, and that he could not perform the tasks required because he was too inebriated. Muniz was then arrested and transported to the Cumberland County Central Booking Center. (J.A. 19-21).

At the Booking Center, Muniz was video-taped, beginning at 3:54 a.m. (Pet. App. B15). Initially Muniz was advised of the identity

of the booking officer and that his actions and voice were being recorded by way of a video camera and recorder. Muniz was not advised of the Miranda warnings at this time. (State's Ex. 2; J.A. 26-29).

At 3:57 a.m., the booking officer asked Muniz his name and address. In order to provide his address, Muniz had to look in his wallet and produced a card with the address on it. Muniz was asked his height, weight, eye color, and date of birth. Upon providing said information, with a date of birth of April 19, 1947, Muniz was asked his current age. He responded that he was age forty-nine. Then he laughed and said, "I mean thirty-nine", and hit his head with his hand. (State's Ex. 2; J.A. 26-29).

Next, he was asked the date of his sixth birthday. After Muniz proved unable to calculate this date, the booking officer administered the three field sobriety tests previously performed at roadside. (Pet.

App. B16). During the "walk and turn" test, Muniz was required to count out loud his steps from one to nine. While performing the "one leg stand" test, Muniz was requested to count out loud to thirty. (State's Ex. 2; J.A. 26-29).

During the entire course of these tests, Muniz attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform. At approximately 4:18 a.m., the Implied Consent Law, 75 Pa. Cons. Stat. Ann. § 1547 (Purdon Supp. 1989), was read to Muniz. He made several unfocused and vague inquiries concerning the import of the Implied Consent Law, and commented upon his state of inebriation and the probable legal implications of his actions. Muniz declined to submit to the breath test. Afterwards, at 4:29 a.m., Muniz was issued his Miranda warnings for the first time since his arrest. (Pet. App. B16; State's

Ex. 2; J.A. 26-29).

Respondent was convicted of Driving Under the Influence of Alcohol, 75 Pa. Cons. Stat. Ann. § 3731 (Purdon Supp. 1989). In reversing the Judgment of Sentence, the Pennsylvania Superior Court held that when the physical nature of field sobriety tests begins to yield testimonial and communicative statements, the protections afforded by Miranda are invoked. (Pet. App. B10).

The Court ruled that Muniz's entire responses during the booking process, his inquiries concerning the meaning of the implied consent law and comments upon his state of inebriation and the probable legal implications of his actions, were all testimonial and within the protections afforded by the Fifth Amendment. (Pet. App. B10).

The Court concluded that none of Muniz's utterances were spontaneous voluntary verbalizations, but rather were compelled by the questions and instructions presented to

him. (Pet. App. B12). The Superior Court held that since Muniz's responses and communications were elicited before he received Miranda warnings, they should have been excluded as evidence, and granted Muniz a new trial. (Pet. App. B17-18).

SUMMARY OF ARGUMENT

I.

The Fifth Amendment protects an accused from being compelled to testify against himself, or otherwise provide evidence of a testimonial or communicative nature. "Testimonial" has been defined as an accused's oral or written communication, or act, which itself, explicitly or implicitly relates a factual assertion or discloses information. When statements of an accused are used, not for the content of what was said, but to interpret a suspect's mental state, said utterances are communicative and protected.

An element of the offense of Driving Under the Influence of Alcohol is mental impairment. In the case at bar, Muniz's utterances were offered by the Commonwealth to disclose the contents of his mind as to his ability to comprehend, reason, and calculate. As a result, the Pennsylvania

Superior Court correctly ruled that Muniz's responses at the Booking Center were testimonial.

II.

The privilege against self-incrimination applies only to custodial interrogation. Any form of direct questioning while in custody constitutes interrogation, even if an incriminating response is not intended. The videotape depicted express questioning of Muniz and, therefore, he was subject to interrogation requiring Miranda warnings.

Even if the protection of Miranda were limited to questions, other than those normally attendant to arrest and custody, that police should know are reasonably likely to elicit an incriminating response, Muniz's responses remain inadmissible. The booking center procedure to which Muniz was subjected went far beyond that normally attendant to arrest and custody. The process was designed to gather evidence as to his mental and physical state to support prosecution.

The question asking Muniz to calculate his sixth birthday clearly exposes the Commonwealth's investigative intent. Police may not use routine biographical questioning as a guise for obtaining incriminating information, and answers to such questions are inadmissible without prior administration of the Miranda rights.

Moreover, the booking center authorities should have known their words and actions were reasonably likely to elicit incriminating responses particularly in light of the arresting officer's prior observations, causing him to believe Muniz was intoxicated, and Muniz's answers to the initial questions posed.

As a result, Muniz was impermissibly interrogated without being advised of his Miranda warnings and his utterances were correctly ruled inadmissible.

ARGUMENT

I. RESPONDENT'S STATEMENTS, INCIDENT TO BOOKING AND FIELD SOBRIETY TESTING, ARE TESTIMONIAL NOT DEMONSTRATIVE, PREVENTING THEIR ADMISSION AT TRIAL WHEN MIRANDA WARNINGS WERE NOT GIVEN.

The Pennsylvania Superior Court correctly ruled that Muniz's responses to initial questioning at the Booking Center, statements during the physical sobriety tests, and questions and comments about the Pennsylvania Implied Consent Law, 75 Pa. Cons. Stat. Ann. § 1547, were testimonial, because they were in response to questions and instructions by authorities that elicited information revealing Muniz's thought processes. (Pet. App. B10, 12, 14-15, 17).

The Fifth Amendment privilege protects an accused from being compelled to testify against himself, or otherwise provide evidence of a testimonial or communicative nature. Schmerber v California, 384 U.S. 757, 761 (1966). Compulsion which makes an accused

the source of real or physical evidence does not violate the privilege. Id. at 764.

The fact that the accused is forced to utter words does not, in itself, constitute self-incrimination. Recordings of an accused's voice are permissible if they are used solely to measure the physical properties of the voice, not for the testimonial or communicative content of what was said. United States v Dionisio, 410 U.S. 1, 7 (1973). Similarly, requiring the uttering of words in a lineup, for purposes of identification rather than as a way of eliciting testimony, does not violate the Fifth Amendment. United States v Wade, 388 U.S. 218, 222-23 (1967).

This Court has defined "testimonial" as an accused's oral or written communication, or act, which itself, explicitly or implicitly, relates a factual assertion or discloses information. Doe v United States, 108 S. Ct. 2341, 2342 (1988). It is the extortion of information from the accused, the attempt

to force him to disclose the contents of his own mind that implicates the Self-Incrimination Clause. Id. at 2348. The relevant inquiry is whether a suspect is required to "speak his guilt." In re Special Fed. Grand Jury, 809 F.2d 1023, 1026 (3d Cir. 1987).

However, the concept of verbal communication is not limited to direct confessions of guilt. Verbal communication is also the use of words to impart or transmit information. Walker v Butterworth, 599 F.2d 1074, 1082 (1st Cir.), cert. denied, 444 U.S. 937 (1979); Tyars v Finner, 518 F. Supp. 502, 509-10 (C.D. Cal. 1981). When words reveal the accused's mental process of thought, they are testimonial. Doe, 108 S. Ct. at 2347; Walker, 599 F.2d at 1082.

The question as to whether a compelled communication is testimonial for Fifth Amendment purposes depends on the facts and circumstances of the particular case. Doe, 108 S. Ct. at 2350. As this Court recognized, some seemingly

physical evidence, such as lie detector tests, measuring changes in bodily function during interrogation, may actually be directed to eliciting responses which are essentially testimonial because an effort is made to determine guilt or innocence based upon physiological responses to questioning. Schmerber, 384 U.S. at 764.

Handwriting exemplars normally are not protected by the privilege against self-incrimination, since they involve an identifying physical characteristic outside its protection. Gilbert v California, 388 U.S. 263, 266-67 (1967). However, a handwriting exemplar requiring a suspect to take dictation, thereby being forced to choose the spelling of the words, has been ruled to be testimonial within the protection of the Fifth Amendment. United States v Campbell, 732 F.2d 1017, 1021 (1st Cir. 1984).

The Campbell court reasoned:

> When he writes a dictated word, the writer is saying, 'This is how I spell it,' - a testimonial

> message in addition to the physical display. If a defendant misspelled a common word, and the document sought to be attributed to him misspelled it the same way, could it be thought that the government would not . . . argue that there was a message?

Id. (citation omitted).

The crime of Driving Under the Influence of Alcohol is unusual, as an element of the offense is the suspect's mental condition, or state of mind. 75 Pa. Cons. Stat. § 3731; Commonwealth v Griscavage, 512 Pa. 540, 544-45, 517 A.2d 1256, 1258 (1986). In order to establish guilt, the Commonwealth had to prove Muniz was driving under the influence of alcohol to a degree which rendered him incapable of safe driving. 75 Pa. Cons. Stat. § 3731. The phrase "under the influence of alcohol" has been interpreted by the Pennsylvania Supreme Court to include:

> not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition

> which is the result of drinking alcoholic beverages and (a) which makes one unfit to drive an automobile, or (b) which substantially impairs his judgment, or clearness of intellect, or any of the normal faculties essential to the safe operation of an automobile.

Griscavage, 512 Pa. at 545, 517 A.2d at 1258 (citation omitted).

"Substantial impairment", in this context, means a diminution or enfeeblement in the ability to exercise judgment, to deliberate, or to react prudently to changing circumstances and conditions. Id.

When statements of an accused are used, not for the testimonial content of what was said, but to interpret mental state, which is at issue, said utterances are communicative and protected by the Fifth Amendment. Estelle v Smith, 451 U.S. 454, 463-65 (1981) (defendant's account of a crime and statements to a psychiatrist used, not for testimonial content of what was said, but to interpret his mental state concerning future dangerousness, were communicative and protected);

Walker, 599 F.2d 1074 (requirement that defendant personally exercise preemptory challenges in presence of jurors in case involving insanity defense revealed defendant's mental thought processes and was testimonial); Tyars, 518 F. Supp. 502 (petitioner's words offered not for their stated content but to show his mental condition and dangerousness were testimonial and protected).

In the case at bar, Muniz's videotaped utterances were offered by the Commonwealth to disclose the contents of his mind as to his ability to comprehend, reason, and calculate, in hopes of establishing intoxication. (State's Ex. 2; J.A. 26-29); Garner v State, ___ S.W.2d ___, No. 2-87-079-CR, p. 34 (Tex. Ct. App. October 12, 1989). It cannot be argued that the ability to know and recite the next number in a sequence, i.e., counting, or to calculate the date of one's sixth birthday merely measures physical ability to speak. Indeed, the ability to count, or calculate a date, depends on the individual's

mental ability to recall and reason and has nothing at all to do with physical ability. Commonwealth v Conway, 368 Pa. Super. 488, 498-99, 534 A.2d 541, 546-47 (1987), allocatur denied, 520 Pa. 581, 549 A.2d 914 (1988); Commonwealth v Bruder, 365 Pa. Super. 106, 528 A.2d 1385, 1388 (1987), allocatur denied, 518 Pa. 635, 542 A.2d 1365, rev'd on other grounds sub nom., Pennsylvania v Bruder, 109 S. Ct. 205 (1988).[1]

Likewise, Muniz's responses seeking clarification of instructions for the field sobriety tests and the Implied Consent Law were not offered into evidence to show Muniz's physical ability to speak, or even to show he understood the instructions, but rather, they

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[1] In light of the foregoing, even if this Court were to rule voice exemplars, compelled from a suspect to show physical inability to speak clearly, are not within the purview of the Fifth Amendment, Muniz's utterances would not be admissible because they contain the above-said testimonial components in addition to exhibiting the physical method of speech. It is impossible to distinquish and exclude the testimonial components of Muniz's responses from his physical method of speech. United States v Hinckley, 672 F.2d 115, 126 (D.C. Cir. 1982).

were offered to show Muniz's mental confusion and inability to comprehend, remember, and execute instructions, in short, to show the state of Muniz's mind. Commonwealth v Thompson, 377 Pa. Super. 598, 606, 547 A.2d 1223, 1227 (1988); Commonwealth v Waggoner, 373 Pa. Super. 23, 29, 540 A.2d 280, 283, allocatur denied, ___ Pa. ___, 554 A.2d 509 (1988), cert. denied, 109 S. Ct. 1769 (1989); Conway, 368 Pa. Super. at 498-99, 534 A.2d at 546-47.[2]

As this Court stated in Miranda:

> No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of

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[2] The National Highway Traffic Safety Administration (NHTSA) training manual, in describing the procedures for field testing, states: "[b]e sure to mention that part of your evaluation will be based upon how well he follows instructions and performs exactly as demonstrated." U.S. Dep't of Transp., Improved Sobriety Testing, US DOT-NHTSA HS-0806512 (Aug. 1989), reprinted in 1 R. Erwin, M. Minzer, L. Greenberg and H. Goldstein, Defense of Drunk Driving Cases § 8A.99, at 8A-43 (3d ed. 1989).

> an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution.

Miranda v Arizona, 384 U.S. 436, 476-77 (1966).

As a result, the Pennsylvania Superior Court correctly ruled Muniz's videotaped utterances to be testimonial and protected by the Fifth Amendment. Doe, 108 S. Ct. at 2342; Estelle, 451 U.S. at 463-65.[3] The Self-Incrimination Clause reflects a judgment that the prosecution should not be free

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[3] Other state courts which have reached similar results include: Thompson v People, 181 Colo. 194, ___, 510 P.2d 311, 315 (1973); Commonwealth v Brennan, 386 Mass. 772, ___, 438 N.E.2d 60, 63 (1982); State v Breeden, 374 N.W.2d 560, 562 (Minn. Ct. App. 1985); State v Strickland, 276 N.C. 253, ___, 173 S.E.2d 129, 134 (1970); Delgado v State, 691 S.W.2d 722, 723 (Tex. Crim. App. 1985).

to build a criminal case, in whole or in part, with the assistance of enforced disclosures of the accused. Doe, 108 S. Ct. at 2348. As this Court stated: "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Schmerber, 384 U.S. at 762.

II. THE INSTRUCTIONS, CLARIFICATIONS AND BACKGROUND QUESTIONS POSED TO RESPONDENT DURING FIELD SOBRIETY TESTING AND BOOKING CONSTITUTED INTERROGATION WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE.

In Miranda, this Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444.

The privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. Id. at 460. Accordingly, statements of an accused during custodial interrogation must be preceded by the warnings set forth in Miranda. Id. at 479.

This Court in Miranda defined "interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody." Id. at 444. If police ask a suspect in custody express questions without giving Miranda warnings, the responses cannot be introduced to establish guilt. Berkemer v McCarty, 468 U.S. 420, 429 (1984).[4] Any form of direct questioning while in custody constitutes interrogation, even if an incriminating response is not intended. United States v Downing, 665 F.2d 404, 406 (1st Cir. 1981); Proctor v United States, 404 F.2d 819, 820-21 (D.C. Cir. 1968).

In the case at bar, the videotape depicts the following express questioning. The booking officer asked Muniz his name, address, height, weight, eye color, and date of birth.

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[4] Petitioner concedes Muniz was in custody at the booking center, as it must. (Pt. B. 17). Muniz had been formally arrested, handcuffed and transported in the back of the police car to the Booking Center, where he was further detained. (J.A. 19-21); Berkemer, 468 U.S. at 440.

Upon providing said information, Muniz was asked his current age. Next, he was asked the date of his sixth birthday. (State's Ex. 2; J.A. 26-29). The booking officer then administered the field sobriety tests. (Pet. App. B16). During the "walk and turn" test, Muniz was required to count out loud his steps from one to nine. While performing the "one leg stand" test, Muniz was requested to count out loud to thirty. Muniz was also asked if he understood the instructions. (State's Ex. 2; J.A. 26-29). The Implied Consent Law, 75 Pa. Cons. Stat. Ann. § 1547, was then read to Muniz and he was asked several times if he understood. (State's Ex. 2; J.A. 26-29; Pet. App. B10).

The Pennsylvania Superior Court found as a matter of fact that "none of Muniz's utterances were spontaneous, voluntary verbalizations. Rather they were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center . . . ." (Pet. App. B17).

When police ask questions of a suspect in custody without administering the required warnings, Miranda dictates an irrebuttable presumption of compulsion. Oregon v Elstad, 470 U.S. 298, 306-07 (1985). As this Court stated in Miranda:

> We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Miranda, 384 U.S. at 461 (footnote omitted).

Because he was expressly questioned, as set forth above, Muniz was subject to "interrogation" requiring Miranda warnings. See Berkemer, 468 U.S. at 429, 434.

In Rhode Island v Innis, 446 U.S. 291 (1980), this Court expanded the Miranda

definition of "interrogation" to include express questioning or its functional equivalent. "Interrogation" was defined as

> not only . . . express questioning, but also . . . any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.

Id. at 301.

Petitioner argues that utterances made in response to "routine booking questions," not designed to elicit an incriminating response, do not constitute "interrogation" as defined above and Miranda warnings are not required. (Pt. B. 19-22). However, the limitation set forth in Innis was not applied to direct questioning, but only to its functional equivalent. Innis, 446 U.S. at 300-01; Downing, 665 F.2d at 407. See also Berkemer, 468 U.S. at 429.[5]

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[5] South Dakota v Neville, 459 U.S. 553 (1983), is inapposite to the case at bar since the decision, that refusal to take a blood alcohol test is not protected by the privilege against self-incrimination,

If this Court were to apply the aforesaid limitation to express questioning, the protection against self-incrimination to an accused would be substantially eroded. Such "routine" information may provide crucial evidence, as in this case. It is a substantial dilution of the principals of Miranda to expect an individual, shaken by his arrest, ignorant of his right to eschew conversation with police, and without benefit of counsel, to make a careful, considered choice based upon the probable consequences of responding to seemingly innocent questions and instructions. See Berkemer, 468 U.S. at 433; Miranda, 384 U.S. at 455, 461, 467-72.

In the instant case, Muniz was asked questions which on their face appeared to be benign attempts to gather statistical data and insure he understood the physical sobriety tests. (State's Ex. 2; J.A. 26-29).

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was based upon a finding of no impermissible coercion encouraging a refusal. It did not reach the issue of whether interrogation occurred in that context. Id. at 562.

Without being given Miranda warnings, Muniz could not have been expected to recognize his responses would be used against him and offered into evidence in an effort to show the intoxicated state of his mind. Therefore, he could not make an intelligent, voluntary choice to speak freely, or to exercise his right against self-incrimination by speaking as little as possible and not answering some or all of the inquiries posited to him.[6]

One of the principal advantages of the Miranda doctrine is its clarity. As this Court opined: "Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and

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[6] Requiring Miranda warnings for all custodial questioning, would not prevent police from obtaining biographical information, asking a suspect if he understood instructions or the Implied Consent law, 75 Pa. Cons. Stat. Ann. § 1547. Rather, it would simply prevent responses to these inquiries from being used in the prosecution's case in chief against the defendant.

of informing courts under what circumstances statements obtained during such interrogation are not admissible." Berkemer, 468 U.S. at 430 (citation omitted).

If an exception were carved out for booking questions, the litigation necessary to resolve whether a question was a routine booking question, or something more, would be time-consuming and disruptive. Instead of the bright line rule of Miranda, the end result would be an elaborate set of rules, with a multitude of exceptions and subtle distinctions, discriminating between different kinds of custodial questioning. Id. at 432.

Exclusion of administrative questioning from the protections of Miranda, would place a premium on the ingenuity of police to devise indirect methods of interrogation disguised as booking or other administrative questioning, such as the "sixth birthday" question in this case, rather than to implement

the protections of Miranda. See Estelle, 451 U.S. at 466; Innis, 446 U.S. at 299.

Even if this Court were to limit the protection of Miranda only to questions, other than those normally attendant to arrest and custody, that police should know are reasonably likely to elicit an incriminating response, Muniz's responses remain inadmissible. The questions and instructions posited to Muniz went far beyond those normally attendant to arrest and custody. Muniz was not merely asked his identity, to submit to fingerprinting and photographing and requested to take a blood-alcohol test. See Neville, 459 U.S. at 564 n.15. Rather he was subjected at the booking center to a process designed to gather evidence as to his mental and physical state in support of the expected prosecution. (Pet. App. B15).

The very fact that the "biographical" questioning of Muniz was recorded, indicates

a purpose beyond that of gathering routine information, especially since it had been previously obtained. Jones v State, 745 S.W.2d 94, 96 (Tex. Ct. App. 1988). It was the testimony of the booking officer, Terry Hosterman, at the suppression hearing, that Muniz had already been asked the necessary booking information before his videotaped responses:

> Q Starting with when you first had contact with the defendant, would you explain how you processed him?
>
> A Well, we take the initial questions, name, date of birth, so forth, the arresting officer. And then he is brought into the room in front of the video camera and the processing is started.

(R. Omnibus Pretrial Motion Hearing, 5/1/87, p. 12).

Moreover, the arresting officer, Spotts, had obtained most, if not all, of the necessary information for booking at the scene of the original traffic stop. (J.A. 18). Surely the authorities did not videotape

said matters simply to have another record of the responses.

Upon providing his date of birth, Muniz was asked to calculate his current age. (State's Ex. 2; J.A. 26-29). Having obtained a date of birth, it was unnecessary to also require the defendant to calculate his age. Muniz was then asked to calculate the date of his sixth birthday, (Pet. App. B16), which Petitioner acknowledges was not for the purpose of identifying information. (Pt. B. 19-21).

Most of the remainder of Muniz's utterances occurred in response to questions and instructions posed during the physical coordination tests. These tests, by their very nature, were designed to gather incriminating evidence of a suspect's physical condition. (Pt. B. 21-22). This cannot be argued to be a situation at all related to a simple request for identity or fingerprinting, photographing or other routine processing upon arrest. Hinckley,

672 F.2d at 122-23; Jones, 745 S.W.2d at 96. If the situation in this case were deemed to be normally attendant to arrest and custody, any procedure devised by police to gather incriminating responses from suspects, routinely and uniformly done as a matter of course in all cases upon arrest would likewise be beyond the protections of the Fifth Amendment.

Police may not use routine biographical questioning as a guise for obtaining incriminating information. Robinson v Percy, 738 F.2d 214, 220 (7th Cir. 1984); United States v Avery, 717 F.2d 1020, 1024-25 (6th Cir. 1983), cert. denied, 466 U.S. 905 (1984); United States v Glen-Archila, 677 F.2d 809, 816 (11th Cir.), cert. denied, 459 U.S. 874 (1982); Hinckley, 672 F.2d at 123-26; United States v Booth, 669 F.2d 1231, 1238 (9th Cir. 1982); Downing, 665 F.2d at 407. If investigative questions are asked while routine information is being obtained, answers

to such questions are inadmissible if the suspect has not been given his Miranda rights. Even questions that usually are routine must be preceded by Miranda warnings if they are intended to produce answers that are incriminating. Glen-Archila, 677 F.2d at 816.

Hinckley addressed a situation similar to the case at bar. In that case, the FBI conducted a twenty-five minute "background" interview of the suspect in a presidential assassination attempt. The agents posed questions to Hinckley concerning his name, physical characteristics, family, educational background, employment history, health, and travel patterns. Hinckley, 672 F.2d at 121. The government argued that said questions were not designed to elicit an incriminating response. However, the Court held that since the agents were aware of the likelihood of an insanity defense, and the questions were relevant to the accused's mental state,

said interview was designed to elicit incriminating responses. Id. at 124-25.

In the case at bar, where Muniz's mental state was at issue, the questions and instructions posited similarly had an obvious investigative intent entwined within. Garner, ___ S.W.2d at ___ No. 2-87-079-CR, p. 34 (Tex. Ct. App. October 12, 1989). The "sixth birthday" question, is the "smoking gun" in this matter, clearly and unambiguously exposing the Commonwealth's investigative intent. Hinckley, 672 F.2d at 124-25. No plausible explanation can be offered for this question beyond the intention of gathering an incriminating response. (Pt. B. 20).

In any event, even when questioning is not asked in an attempt to elicit evidence of a crime, it may still constitute interrogation. Booth, 669 F.2d at 1238. The factual setting of the encounter must be carefully scrutinized. Even a relatively innocuous series of questions, may, in light of the factual circumstances,

be reasonably likely to elicit an incriminating response. Avery, 717 F.2d at 1025; See Downing, 665 F.2d at 407. The ultimate test is whether, in light of all the circumstances, the authorities should have known that a question was reasonably likely to elicit an incriminating response. Booth, 669 F.2d at 1238.

The authorities should have known their words and actions were reasonably likely to elicit incriminating responses from Muniz. During the initial roadside stop, Officer Spotts claimed to have observed a strong odor of alcohol, bloodshot eyes, and poor coordination. (J.A. 13-14). Muniz had trouble producing his driver's license and registration, (J.A. 16-18), and, in the opinion of the officer, had failed three roadside sobriety tests. Administration of these tests prompted incriminating verbal responses from Muniz. (J.A. 19-21). Officer Spotts believed Muniz to be intoxicated.

(J.A. 14). As a result, the law enforcement authorities knew any question or instruction posited to Muniz at the booking center was reasonably likely to elicit an incriminating response.

During the initial videotaped questioning, Muniz had to look in his wallet and obtain a card to provide his address, upon request. Upon providing his date of birth Muniz was asked his current age, which he incorrectly calculated. (State's Ex. 2; J.A. 26-29). Even if none of Officer Spotts' observations are imputed to the booking center personnel, at this point in the questioning, the officer should have known any response from Muniz was reasonably likely to elicit an incriminating response.

Nonetheless, Muniz was next asked to calculate the date of his sixth birthday, which he could not do. (Pet. App. B16). Based upon Muniz's preceding answers, the booking officer should have known the "sixth birthday" question and all questions and

comments thereafter were reasonably likely to elicit an incriminating response. See Robinson, 738 F.2d at 220; Downing, 665 F.2d at 407; Jones, 745 S.W.2d at 96.

As a result, Muniz was impermissibly interrogated without being advised of his Miranda warnings and his utterances were correctly ruled inadmissible.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court of Pennsylvania should be affirmed.

Respectfully submitted,

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